Datuk Mohd Zaid bin Ibrahim v Peguam Negara Malaysia

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO WA-25–23–03 OF 2016
HANIPAH FARIKULLAH J
7 NOVEMBER 2016

Civil Procedure — Judicial review — Application for — Applicant applied for judicial review challenging decisions of attorney general ('the respondent') that Prime Minister had not committed any offence and further instructed Malaysian Anti-Corruption Commission ('MACC') to close files — Respondent filed preliminary objections — Whether decision of attorney general to prosecute or not to prosecute under art 145(3) of the Federal Constitution justiciable or amenable to judicial review — Whether challenge in respect of instructions to close file was frivolous and vexatious as the instruction did not prohibit MACC to reopen investigations on new evidence — Federal Constitution art 145(3) — Malaysian Anti-Corruption Commission Act 2009 s 29

The applicant filed the present action for judicial review challenging the decision of the attorney general ('the respondent') made on 26 January 2016 in a press conference that: (a) Dato' Sri Mohd Najib bin Tun Abdul Razak ('the Prime Minister') had not committed any criminal offence based on the evidence and recommendations submitted to him by Malaysian Anti-Corruption Commission ('the MACC'); and (b) the respondent was returning the investigation papers to the MACC with instructions to close the files. The respondent in response raised preliminary objections on the grounds that: (a) it was settled law that the decision by Attorney General to prosecute or not to prosecute under art 145(3) of the Federal Constitution ('the Constitution'), was not justiciable or amenable to judicial review; (b) the challenge in respect of the instructions to close the file (NFA/KUS) was frivolous and vexatious as the instruction did not prohibit the MACC to reopen investigations on new evidence; and (c) the applicant had failed to cross the threshold locus standi.

Held, dismissing the applicant's application:

(1) The effect and meaning of art 145(3) of the Constitution had been settled by long line of decisions of the apex courts. These courts had held that the decision of the AG to institute or not to institute criminal proceedings was not justiciable or amenable to judicial review (see para 28).

(2) The instruction of NFA/KUS had nothing to do with the exercise of the AG's discretion ('AG') under art 145(3) of the Constitution. It merely

related to the instructions commonly minute in the investigation papers after a decision not to prosecute was made. The minute of NFA/KUS in the investigation papers did not impede the MACC to reopen investigations on new evidence. There was in fact no evidence adduced to show that the MACC had been so impeded. There was no encroachment on the investigation powers of the MACC under the Malaysian Anti-Corruption Commission Act 2009 ('the Act') (see paras 35 & 37).

(3) Pursuant to s 29 of the Act, the investigation papers of the MACC officer or any such papers in respect of offences under the Act has been opened, it is classified as 'secret' by operation of law. Hence, the applicant had no knowledge whatsoever of the facts and evidence the MACC had placed before the respondent. The evidence and material which the respondent considered in arriving at his decision was therefore not before the court. Hence, neither the court nor the applicant may have access to those MACC investigation papers. On the facts of the case, there was no purpose for the court to grant leave just for the purpose of investigation on full inter parte basis as there was no arguable case in respect of the applicant's application (see paras 39–43).

[Bahasa Malaysia summary

Pemohon memfailkan tindakan ini untuk semakan kehakiman dengan mencabar keputusan Peguam Negara ('responden') yang dibuat pada 26 Januari 2016 dalam sidang media bahawa: (a) Dato' Sri Mohd Najib bin Tun Abdul Razak ('Perdana Menteri') tidak melakukan apa-apa kesalahan jenayah berdasarkan keterangan dan cadangan-cadangan yang diserahkan kepadanya oleh Suruhanjaya Pencegahan Rasuah Malaysia ('SPRM'); dan (b) responden memulangkan kertas-kertas siasatan kepada SPRM dengan arahan-arahan untuk menutup fail-fail tersebut. Responden dalam menjawab membangkitkan bantahan awalan atas alasan-alasan bahawa: (a) ia adalah undang-undang tetap bahawa keputusan peguam negara ('PN') untuk mendakwa atau tidak mendakwa di bawah peruntukan perkara 145(3) Perlembagaan Persekutuan ('Perlembagaan'), tidak boleh diadili atau bersetuju kepada semakan kehakiman; (b) cabaran berkaitan arahan-arahan untuk menutup fail (NFA/KUS) adalah remeh dan menyusahkan kerana arahan-arahan tidak melarang SPRM membuka semula siasatan-siasatan atas keterangan baru; dan (c) pemohon telah gagal untuk melintasi ambang locus standi.

Diputuskan, menolak permohonan pemohon:

(1) Kesan dan maksud perkara 145(3) Perlembagaan telah ditetapkan oleh deretan panjang keputusan mahkamah tertinggi. Mahkamah-mahkamah ini telah memutuskan bahawa keputusan PN untuk memulakan atau tidak memulakan prosiding jenayah adalah tidak boleh diadili atau bersetuju kepada semakan (lihat perenggan 28).

(2) Arahan-arahan NFA/KUS tidak kena mengena dengan pelaksanaan budi bicara PN di bawah perkara 145(3) Perlembagaan. Ia hanya berkaitan kepada arahan-arahan biasanya diminitkan di dalam kertas-kertas siasatan selepas keputusan untuk tidak mendakwa dibuat. Minit NFA/KUS di dalam kertas-kertas siasatan tidak menghalang SPRM untuk membuka semula penyiasatan atas keterangan baru. Sebenarnya tidak terdapat keterangan yang dikemukakan untuk menunjukkan bahawa SPRM telah dihalang. Tidak terdapat pencerobohan atas kuasa penyiasatan SPRM di bawah Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 ('Akta') (lihat perenggan 35 & 37).

(3) Berikutan s 29 Akta, kertas-kertas siasatan pegawai SPRM atau apa-apa kertas sedemikian berkaitan kesalahan di bawah Akta telah dibuka, ia diklasifikasikan sebagai 'secret' oleh operasi undang-undang. Maka, pemohon tidak mempunyai apa-apa pengetahuan mengenai fakta dan keterangan yang dikemukakan oleh SPRM di hadapan responden. Keterangan dan material yang mana dipertimbangkan oleh responden dalam mencapai kepada keputusannya adalah oleh itu bukan di hadapan mahkamah. Maka, tidak mahkamah ataupun pemohon mempunyai akses kepada kertas-kertas siasatan SPRM tersebut. Atas fakta kes, tidak terdapat maksud untuk mahkamah memberikan izin hanya untuk tujuan siasatan atas sepenuhnya dasar inter parte kerana tidak terdapat kes yang boleh dibicarakan berkaitan permohonan pemohon (lihat perenggan 39–43).]

Notes

For cases on application for judicial review, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5937–5949.

Cases referred to

Director of Public Prosecutions v Humphrys [1976] 2 All ER 497, HL (refd)
Dr Michael Jeyakumar Devaraj v Peguam Negara Malaysia [2013] 2 MLJ 321, FC (folld)
Johnson Tan Han Seng v PP [1977] 2 MLJ 66, FC (refd)
Karpal Singh & Anor v PP [1991] 2 MLJ 544, SC (refd)
Law Society of Singapore v Phylis Tan [2008] 2 SLR 239, HC (refd)
Long bin Samat & Ors v PP [1974] 2 MLJ 152, FC (refd)
Mohd Rafizi bin Ramli v PP [2014] 3 MLJ 114, CA (refd)
Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135, FC (refd)
PP v Zainuddin & Anor [1986] 2 MLJ 100, SC (refd)
R v Director of Public Prosecutions, ex parte Manning and another [2000] All ER (D) 674, QBD (not folld)
Regina v DPP, Ex parte C [1995] 1 Cr App R 136, QBD (refd)
Repco Holdings Bhd v PP [1997] 3 MLJ 681, HC (refd)

A *Teh Cheng Poh v PP* [1979] 1 MLJ 50, PC (refd)
Teh Guat Hong v Perbadanan Tabung Pendidikan Tinggi Nasional [2015] MLJU 213; [2015] MLJU 2039; [2015] MLJU 2268, CA (refd)
Tuan Hj Sarip Hamid & Anor v Patco Malaysia Bhd [1995] 2 MLJ 442; [1995] 3 CLJ 627, SC (folld)
B *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd* [2012] 4 MLJ 296, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 Schedule, para 1
Federal Constitution arts 5(1), 8(1), 145(3)
C Malaysian Anti-Corruption Commission Act 2009 s 29
Police Act 1967

Amarjit Singh Sidhu (Americk Sidhu) for the applicant.
Amarjeet Singh Serjit Singh (Awang Armadajaya, Shamsul Bolhassan and Suzana Atan with him) (Senior Federal Counsel, Attorney General's Chambers) for the respondent.
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Hanipah Farikullah J:

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[1] This case concerned whether the decision of the attorney general made under art 145(3) of the Federal Constitution is amenable to judicial review.

[2] The foundation of the application are decisions made by the attorney
F general ('the AG') appearing in a press release issued on 26 January 2016 ('the press release'). The decisions were made pursuant to the submission of three investigations papers by the Malaysian Anti-Corruption Commission ('MACC') to the AG for his decision.

G **[3]** The applicant's contention in this judicial review application is essentially challenging the decision of the attorney general made on 26 January 2016 in a press conference.

H **[4]** The applicant alleges that the AG had on 26 January 2016 revealed in a press conference his decision:

(a) that Dato' Sri Mohd Najib bin Tun Abdul Razak ('the Prime Minister') had not committed any criminal offence based on the evidence and recommendations submitted to him by the MACC; and

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(b) that the AG was returning the investigation papers to the MACC with instructions to close the files.

RELIEFS

[5] In this application, the applicant seeks for the following reliefs:

(a) a declaration that the decision not to prosecute the Prime Minister *is ultra vires of art 145(3)*;

(b) a declaration that the decision directing the MACC to close its files on the investigation into offences committed by the Prime Minister is ultra vires of art 145(3);

(c) a direction in the nature of certiorari to quash the said decisions; and

(d) a direction in the nature of *mandamus* to compel the AGC to institute criminal proceedings against the Prime Minister.

[6] In support of its application, the applicant relied on the following grounds:

(a) upon a true construction of art 145(3) of the Federal Constitution read with arts 5(1) and 8(1) thereof, the *respondent's decision not to institute any criminal proceedings against the Prime Minister is capable of being* the subject matter of judicial review;

(b) the respondent took into account irrelevant considerations when arriving at the said decision;

(c) *the respondent failed to take into account relevant considerations* when arriving at the said decision. In particular, the respondent failed to take into account any recommendation made by *the MACC when arriving at the* said decision;

(d) the said decision by the respondent is unreasonable and is such that no reasonable attorney general in the shoes of the respondent would have made, given the nature of the evidence placed before him;

(e) the said decision constitutes *an abuse of the discretion* vested in the respondent by the provisions of art 145(3) of the Federal Constitution and is accordingly null and void;

(f) the said decision is a violation of the applicant's fundamental right as guaranteed by the provisions of art 5(1) read with art 8(1) of the Federal Constitution in that upon a true construction of the said article, the applicant has a right of access to justice and the respondent's public declaration that the exercise of his discretion is not reviewable constitutes an infringement of the applicant's aforesaid right; and

(g) the respondent is under a legal and/or a constitutional duty to exercise the discretion conferred upon him by the provisions of art 145(3) with due consideration, reasonably in the public interest and with a sense of

justice. Given the totality of the material made available to the respondent by MACC the respondent failed to act accordingly and is therefore amenable to a direction of the nature of mandamus under para 1 of the Schedule to the Courts of Judicature Act 1964.

PRELIMINARY OBJECTIONS

[7] In gist the AGC raised preliminary objections mainly on the following grounds:

(a) it is settled law that the decision by AG to prosecute or not to prosecute under art 145(3) of the Federal Constitution, is not justiciable or amenable to judicial review;

(b) the challenge in respect of the instructions to close the file (NFA/KUS) is frivolous and vexatious as the instruction does not prohibit the MACC to reopen investigations on new evidence; and

(c) the applicant has failed to cross the threshold locus standi.

[8] The role of the AGC at leave stage is stated by the Court of Appeal in *Teh Guat Hong v Perbadanan Tabung Pendidikan Tinggi Nasional* [2015] MLJU 213; [2015] MLJU 2039; [2015] MLJU 2268 as follows:

> This then brings me to significance of the honorable Attorney General's input at the leave stage of a judicial review application ... It is trite that the 'leave' proceedings are intended to sieve out unwanted or frivolous applications before it moves to the substantive stage of proceedings. Teh Guat Hong from the attorney general's Chambers at this stage, in that context, was to appraise the court of any particular features of the case that would disqualify any leave being granted to the applicant concerned.
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> The AGC is merely appraising this honorable court of features in the applicant's case which would disqualify leave being granted.

[9] The first point that i will deal with is the senior federal counsel's principal contention that the decision of the AG not to institute criminal proceedings under art 145(3) of the Federal Constitution is non justiciable and hence is not reviewable by the court. As such learned senior federal counsel submitted that this application is an abuse of the court process and should be dismissed.

[10] Article 145(3) of the Federal Constitution states as follows:

> 145 Attorney General
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> ...
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> (3) The attorney general shall have power, exercisable at his discretion, to institute,

conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah Court, a native court or a court-martial.

[11] I will begin with the Federal Court case of *Long bin Samat & Ors v Public Prosecutor* [1974] 2 MLJ 152:

(a) In our view, this clause (art 145(3)) from the supreme law clearly gives the *Attorney General very wide discretion over the control and direction of all criminal prosecutions. Not only may he institute and conduct any proceedings for an offence, he may also discontinue criminal proceedings that he has instituted, and the courts cannot compel him to institute any criminal proceedings which he does not wish to institute or to go on with any criminal proceedings which he has decided to discontinue*.

(b) *Anyone who is dissatisfied with the attorney general's decision not to prosecute, or not to go on with a prosecution or his decision to prefer a charge for a less serious offence when there is evidence of a more serious offence which should be tried in a higher court, should seek his remedy elsewhere, but not in the courts*.

[12] In *Johnson Tan Han Seng v Public Prosecutor* [1977] 2 MLJ 66, the Federal Court was asked to determine whether the AG may discriminate between persons charged for the possession of firearms under different statutes carrying different sentences. The Federal Court followed the interpretation of art 145(3) in *Long bin Samat & Ors v Public Prosecutor* [1974] 2 MLJ 152 and further held that art 8(1) is to be read subject to art 145(3) in the following words:

(a) As s 376(i) of the Criminal Procedure Code was already in existence before Merdeka our constitution-makers could have been content with relying on it alone to preserve after Merdeka the Attorney-General's pre-Merdeka power, and if they had done so then it might be arguable that after Merdeka it must be read subject to art 8; but our constitution makers were not content to do so. *They deliberately wrote art 145(3) into our constitution … In view of the deliberate decision of our constitution-makers to write this provision into our constitution I do not think that it can be said that it must be read subject to art 8. Rather, in my view, the contrary: article 8 it is that must be read subject to article 145(3)*.

(b) *In deciding that the Attorney-General is not constrained by art 8 when deciding whether or not to prosecute and if so on what charge, whether a lesser or a greater one, it must not be thought that he may dishonestly. The public of whose interest he is the guardian has a right to expect him to act honestly, without fear of powerful national and local figures or of the consequences to him personally or politically, and without favoring his relatives and friends and supporters, his principal concern being to maintain the rule of law so that there will be no anarchy and to maintain standards in public life and the private sector; and if he did not do his duty honestly and properly the public would be able to show their disapproval not however in the courts but*

elsewhere and in the last resort by voting against the party of which he is a member.

[13] The Privy Council in *Teh Cheng Poh v Public Prosecutor* [1979] 1 MLJ 50 upheld the interpretation of art 145(3) by the Federal Court in the following words:

(a) It was contended on behalf of the appellant that the exercise of this discretion by the attorney general deprived the appellant of his right under art 8(1) of the Constitution to equality before the law ... Their Lordships agree with the Federal Court in rejecting the contention. *Under the common law system of administration of criminal justice a prosecuting authority has a discretion whether to institute proceedings at all and, if so, with what offence to charge the accused. Such* a discretion is conferred upon *the attorney general of Malaysia by art 145(3) of the Constitution*.

(b) *There are many factors which a prosecuting authority may properly take into account in exercising its discretion as to whether to charge a person at all, or, where the information available to it discloses the ingredients of a greater as well as a lesser offence, as to whether to charge the accused with the greater or the lesser. The existence of those factors to which the prosecuting authority may properly have regard and the relative weight to be attached to each of them may vary enormously between one case and another. All that equality before the law requires, is that the cases of all potential defendants to criminal charges shall be given unbiased consideration by the prosecuting authority and that decisions whether or not to prosecute in a particular case for a particular offence should not be dictated by some irrelevant consideration*.

[14] I have carefully read the privy council decision in *Teh Cheng Poh*, and in my view this is the ratio decidendi of *Teh Cheng Poh* that the AG by virtue of art 145(3) 'has a discretion whether to institute proceedings at all and, if so, with what offence to charge the accused' and as such art 8(1) was construed as being subject to art 145(3).

[15] The High Court in *Repco Holdings Bhd v Public Prosecutor* [1997] 3 MLJ 681 summed up the decisions of *Long bin Samat* and *Johnson Tan* as follows:

(a) The importance of the propositions formulated by the learned Lord President in these two cases is that, as a matter of *public law, the exercise of discretion by the attorney general in the context of art 145(3) is put beyond judicial review. In other words, the exercise by the attorney general of his discretion, in one way or another, under art 145(3), cannot be questioned in the courts by way of certiorari, declaration or other judicial review proceedings*.

(b) *I think that the proposition is not only good law but good policy. For, were it otherwise, upon each occasion that the attorney general decides not to institute or conduct or discontinue a particular criminal proceeding, he will be called*

upon to a court of law the reasons for his decision. It will then be the court and not the attorney general who will be exercising the power under art 145(3). That was surely not the intent on our founding fathers who framed our Constitution for us.

[16] In *Public Prosecutor v Zainuddin & Anor* [1986] 2 MLJ 100, the Supreme Court held that the AG's decision is not open to judicial review. The position was stated as follows:

(a) *The law and Constitution in giving the Attorney-General an exclusive power respecting direction and control over criminal matters expect him to exercise it honestly and professionally. The law gives him a complete trust in that the exercise of this power is his and his alone and that his decision is not open to any judicial review*.

(b) *If he is a Minister of the Government he is answerable to Parliament and to his cabinet colleagues, and if he is not, the government will answer for him in Parliament, whilst he himself will be answerable to the government, and if he is a civil servant he will be answerable also to the Judicial and Legal Service Commission*.

[17] In *Karpal Singh & Anor v Public Prosecutor* [1991] 2 MLJ 544, the *Supreme Court reiterated the law on art 145(3) as follows*:

Unlike UK, the Constitution of the Federation which is a written law is specifically declared to be the supreme law of the land. For our immediate purpose we wish to refer to art 145(3) of the Constitution which states that … The discretion vested in the attorney general is unfettered and cannot be challenged and substituted by that of the court's. The reasoning and logic behind such contention is well illustrated in the cases of Public Prosecutor v Lee Tin Bau [1985] 1 MLJ 388, *Long bin Samat & Ors v Public Prosecutor* [1974] 2 MLJ 152, *Public Prosecutor v Datuk Harun bin Haji Idris and Ors* [1976] 2 MLJ 116 and *Poh Cho Ching v Public Prosecutor* [1982] 1 MLJ 86. *In the circumstances, it is superfluous to reiterate the same points*.

[18] In *Mohd Rafizi bin Ramli v Public Prosecutor* [2014] 3 MLJ 114, the Court of Appeal held that the courts ought to refrain from inquiring into the AG's exercise of discretion under art 145(3) following *Director of Public Prosecutions v Humphrys* [1976] 2 All ER 497 where it was said:

A judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution. The functions of prosecutors and of judges must not be blurred. If a judge has power to decline to hear a case because he does not think it should be brought, then it soon may be thought that the cases he allows to proceed are cases brought with his consent or approval.

[19] Learned counsel for the applicant relied on the principles in *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135 case to support its contention that the exercise of

discretionary power by the AG is amenable to judicial review.

[20] It must be emphasised that *Sri Lempah* is not decided by the apex court in the context of art 145(3) of the Federal Constitution.

[21] I agreed with learned senior federal counsel's argument that *Sri Lempah* has no bearing on the interpretation of art 145(3). In any event, cases such as *Zainuddin*, *Karpal Singh* and *Repco* which are cases on art 145(3) were all decided after *Sri Lempah*.

[22] It was also contended by the applicant that the Singapore case, *Law Society of Singapore v Phylis Tan* [2008] 2 SLR 239 is an authority for the proposition that based on *Teh Cheng Poh*'s case, the AG's discretions could be challenged if the first respondent had exercised his discretion unlawfully.

[23] In my view, the case of *Phylis Tan* expressed the position between the judicial power of the courts and the prosecutorial power of the AG, as follows:

> [144] Article 93 of the Federal Constitution provides that:
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> The judicial power of Singapore shall be vested in a Supreme Court and in such subordinate courts as may be provided by any written law for the time being in force.
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> But, separately, Art 35(8) provides that: The Attorney-General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for any offence.
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> *These two provisions expressly separate the prosecutorial function from the judicial function, and give equal status to both functions. Hence, both organs have an equal status under the Constitution, and neither may interfere with each other's functions or intrude into the powers of the other, subject only to the constitutional power of the court to prevent the prosecutorial power from being exercised unconstitutionally*. Indeed, this is not even a true 'interference' in as much as the exercise of a function unconstitutionally is, in effect, not an exercise of that function at all and which it is therefore the duty of the court (pursuant to the constitution itself) to prevent.
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> [145] *In relation to public prosecutions, Art 35(8) makes it clear that the institution, conduct or discontinuance of any criminal proceedings is a matter for only the Attorney-General to decide*. This means that, except for unconstitutionality, the Attorney-General has an unfettered discretion as to when and how he exercises his prosecutorial powers. *This also means that it is improper for the court to prevent the Attorney-General from prosecuting an offender by staying the prosecution*.

[24] Learned counsel for the applicant also argues that Commonwealth decisions show that a decision not to prosecute in those jurisdictions is subject to judicial review.

[25] I agreed with the contention of learned senior federal counsel that the common law principle in *Regina v DPP, Ex parte C* [1995] 1 Cr App R 136 and *R v Director of Public Prosecutions, ex parte Manning and another* [2000] All ER (D) 674 cited by the applicants, in my view do not apply in Malaysia as it is based on legislation the Code for Crown prosecutors which is peculiar to England. In the circumstances the said common law cases are not relevant or applicable in the Malaysian context which is governed by art 145(3).

[26] The Federal Court in *Johnson Tan* had also considered the Indian position and held as follows:

> The corresponding art 76 of the Indian Constitution dealing with the attorney general in India does not contain a similar provision, merely providing by cll (2) and (3) that:
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> (2) It shall be the duty of the attorney general to give advice to the Government of India upon such legal matters, and to perform such other duties of a legal character, as may from time to time be referred or assigned to him by the President, and to discharge the functions conferred on him by or under this constitution or any other law for the time being in force.
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> (3) In the performance of his duties the attorney general shall have right of audience in all courts in the territory of India.

[27] It is pertinent to note that Indian decisions do not apply in Malaysia. There is no similar provision as our art 145(3).

[28] I have analysed the authorities submitted by both parties and I agreed with the submissions of the senior federal counsel that the effect and meaning of art 145(3) has been settled by long line of decisions of the apex courts. These courts have held that the decision of the AG to institute or not to institute criminal proceedings is not justiciable or amenable to judicial review.

[29] It must be stressed that the AG is expected to act honestly and without fear and favor. However the avenue of the person being unhappy with his decision is elsewhere and not to the court.

MACC'S INVESTIGATION PAPERS

[30] The applicant contended that the decision of the AG directing the MACC to close its files upon the investigation into offences committed by the Prime Minister is ultra vires the AG's powers under art 145(3) of the Federal Constitution.

[31] On this issue, the AG filed an affidavit to exhibit the press statement which shows the words he used were as follows:

A Berdasarkan kepada keseluruhan fakta dan keterangan, saya sebagai Pendakwa Raya berpuas hati bahawa tiada apa-apa kesalahan jenayah yang dilakukan oleh YAB PM berkait ketiga-tiga kertas siasatan. Pada hari ini, kertas-kertas siasatan yang berkaitan akan dikembalikan kepada pihak SPRM dengan arahan supaya ketiga-tiga kertas siasatan tersebut ditutup (NFA/KUS).

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[32] The AG explained in his affidavit that the letters NFA/KUS is an abbreviation for 'No Further Action' and 'Kemas Untuk Simpanan (tidy for keeping)' and is used as follows:

C Ini adalah arahan mengikut amalan biasa pihak pendakwaan yang diminitkan dalam kertas siasatan sekiranya tiada pendakwaan akan dibuat. Apa yang dimaksudkan dengan perkataan-perkataan 'kertas siasatan ditutup (NFA/KUS)' ialah fakta dan keterangan yang dikemukakan dalam kertas siasatan tidak menzahirkan wujudnya apa-apa kesalahan jenayah.

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[33] The AG said that the abbreviations were normal practice of minuting an investigation paper by the prosecutor when there is no prosecution.

[34] It was pointed out by learned senior federal counsel that the AG minute E his instruction of 'No Further Action' after deciding that 'no offence committed by the Prime Minister' based on the existing facts and evidence in the investigation papers. *The AG instructed the files to be closed since there was no further action to be taken as no offence was disclosed from the investigation papers. This is the usual practice adopted by the AGC.*

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[35] I have carefully considered this issue and I accept the contention of learned senior federal counsel that the instruction of NFA/KUS has nothing to do with the exercise of the AG's discretion under art 145(3). It merely relates to the instructions commonly minute in the investigation papers after a decision G not to prosecute is made.

[36] In this present case, the AG as public prosecutor minute his instruction of 'No Further Action' after deciding that 'no offence committed by the Prime H Minister' based on the existing facts and evidence in the investigation papers. The AG instructed the files to be closed since there was no further action to be taken as no offence was disclosed from the investigation papers. It must emphasised that the AG stated in his affidavit that the MACC is free to reopen the file and investigate on new evidence received:

I Saya juga mendapati bahawa tiada keperluan bagi pihak SPRM menjalankan apa-apa lagi siasatan lanjut kerana saya berpuas hati bahawa siasatan yang telah dijalankan ini adalah cukup untuk saya membuat keputusan. Oleh yang demikian tiada tindakan lanjut perlu diambil dan kertas siasatan adalah untuk dikemaskan

untuk simpanan. Walau bagaimanapun ini tidak bermakna pihak SPRM tidak boleh membuka semula kertas siasatan tersebut sekiranya terdapat fakta atau keterangan yang baru.

[37] I am of the view that the minute of NFA/KUS in the investigation papers does not impede the MACC to reopen investigations on new evidence. There is in fact no evidence adduced to show that the MACC has been so impeded. *There is no encroachment on the investigation powers of the MACC under the MACC Act*. It must be stressed that pursuant to s 29 of the Malaysian Anti-Corruption Commission Act 2009 (Act 694) the power to carry out, investigate and report anything relating to the commission of an offence is given by the Parliament to the Commission.

[38] On the scope of s 29 of the MACC, learned senior federal counsel has correctly stated the position of the law namely:

(a) every report on the commission of offences for which the MACC may investigated must be reduced to writing;

(b) if after perusing over such a report, an MACC officer finds that it raised a suspicion that an offence for which the said MACC officer may investigate, then he may initiate an investigation using all the powers under the MACC Act or the Police Act 1967;

(c) that report and the resultant investigation is classified as SECRET unless:

(i) the suspect has been charged in a court of law or;

(ii) the public prosecutor declassified it as such or;

(iii) an officer of the Commission of the rank of commissioner and above, declassified it as such.

[39] It is important to note that pursuant to s 29 of the MACC Act, the investigation papers of the MACC officer or any such papers in respect of offences under MACC Act 2009 has been opened, it is classified as SECRET by operation of law.

[40] Hence, I accept the submission of learned senior federal counsel that the applicant has no knowledge whatsoever of the facts and evidence the MACC had placed before the AG. The evidence and material which the AG considered in arriving at his decision is therefore not before this court.

[41] It must also be noted that the applicants is not challenging the validity of s 29 of the MACC Act particularly with regards to the status of the MACC papers which by operation of law is classified as secret.

[42] Hence, neither the court nor the applicant may have access to those MACC investigation papers.

[43] On the facts of this case it seems to me there is no purpose for this court to grant leave just for the purpose of investigation on full inter parte basis as there is no arguable case in respect of the applicant's application (see *Tuan Hj Sarip Hamid & Anor v Patco Malaysia Bhd* [1995] 2 MLJ 442; [1995] 3 CLJ 627 and *Dr Michael Jeyakumar Devaraj v Peguam Negara Malaysia* [2013] 2 MLJ 321 applied).

CONCLUSION

[44] Based on the above reasons in my view, strong reasons exist for this court to dismiss the applicants' application at this preliminary stage without proceeding to the hearing of the substantive issue.

[45] Hence it seems to me there is no purpose for this court to grant leave just for the purpose of investigation on full inter parte basis as there is no arguable case in respect of the applicant's application (see *Tuan Hj Sarip Hamid & Anor v Patco Malaysia Bhd* [1995] 2 MLJ 442; [1995] 3 CLJ 627 and *Dr Michael Jeyakumar Devaraj v Peguam Negara Malaysia* [2013] 2 MLJ 321 applied).

[46] In *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd* [2012] 4 MLJ 296 the Federal Court reiterated as follows:

> Leave may be granted if the leave application is not thought of as frivolous, and if leave is granted, an arguable case in favor of granting the reliefs sought at the substantive hearing may be the resultant outcome. *A rider must be attached to the application though ie unless the matter for judicial review is amenable to judicial review no success may be envisaged.*

[47] In the light of the above reasons, it is not necessary for me to consider the issue of the applicant's locus standi.

Applicant's application dismissed.

Reported by Dzulqarnain Ab Fatar